Supreme Court, U.S.
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No. 96-32

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

JOHN MANNING and DEAN ZELINSKY,
Petitioners,
v.

CITY OF CHICAGO, THE OXFORD HOUSE, ZERO PLUS DIALING, INC., RESURGENS COMMUNICATIONS GROUP, INC., INTERNATIONAL TELECHARGE, INC., OPERATOR ASSISTANCE NETWORK, SHEFFIELD SYSTEMS, INC., PEOPLE'S TELEPHONE CO., INC., TELECOM*USA, and ILLINOIS BELL TELEPHONE COMPANY,
Respondents.

On Petition for Writ of Certiorari to the Appellate Court of Illinois, First District

BRIEF FOR RESPONDENT TELECOM*USA IN OPPOSITION

DONALD B. VERRILLI, JR.
JENNER & BLOCK
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

THOMAS F. O'NEIL III
MCI COMMUNICATIONS CORPORATION
1133 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 736-6412

CHESTER T. KAMIN *
GREGORY J. SCANDAGLIA
JOHN F. WARD, JR.
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

*Counsel for Respondent Telecom*USA*

* Counsel of Record

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RULE 29.6 STATEMENT

Telecom*USA is a wholly owned subsidiary of MCI Financial Management Corporation. MCI Financial Management Corporation is a wholly owned subsidiary of MCI Communications Corporation.

TABLE OF CONTENTS

	Page
RULE 29.6 STATEMENT	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
A. Federal Regulation of Operator Services	1
B. The Proceedings Below	5
REASONS FOR DENYING THE PETITION	7
CONCLUSION	16

TABLE OF AUTHORITIES

CASES — Page

Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608 (1992) 9, 10
Comtronics, Inc. v. Puerto Rico Tel. Co., 553 F.2d 701 (1st Cir. 1977) 13
Hines v. Davidowitz, 312 U.S. 52 (1941) 9
In re OSPA, 6 F.C.C.R. 4475 (1991) 9, 10, 12, 15
Kellerman v. MCI Telecommunications Corp., 493 N.E.2d 1045, *cert. denied*, 479 U.S. 949 (1986) .. 13, 14
Medtronic, Inc. v. Lohr, Nos. 95-754, 95-886, 1996 U.S. LEXIS 4260 (Jun. 26, 1996) 10, 11, 15
M.R.C.S., Inc. v. MCI Telecommunications Corp., No. Civ. A 86-3831, 1987 U.S. Dist. LEXIS 5244 (E.D. La. Jun. 16, 1987) 13
Thermalcraft, Inc. v. U.S. Sprint Communications Co., 779 F. Supp. 1039 (W.D. Mo. 1991) 13, 14
United States v. American Tel. and Tel. Co., 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983) 2

STATUTES

Federal Communications Act, 47 U.S.C. § 151, *et seq.* 6
Telephone Operator Consumer Services Improvement Act,
47 U.S.C. § 226(b)(1) 3
§ 226(c)(1) 4
§ 226(d)(1) 4
§ 226(h) 3
§ 414 ..... 13, 14

OTHER AUTHORITIES

56 Fed. Reg. 18519 (Apr. 23, 1991) 4
Final Report Pursuant to the Telephone Operator Consumer Services Improvement Act of 1990 (November 13, 1992) 5
S. Rep. No. 439, 101st Cong., 2d Sess. (1990) 2, 3, 4

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BRIEF FOR RESPONDENT TELECOM*USA IN OPPOSITION

Respondent Telecom*USA respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the judgment and opinion of the Appellate Court of Illinois, First District, entered in this case on November 13, 1995.

STATEMENT OF THE CASE

A. Federal Regulation of Operator Services

Until 1982, virtually all interstate long distance telecommunications services in this country were provided by American Telephone & Telegraph Company ("AT&T").

In 1982, the United States and AT&T entered into a consent decree which, among other things, required AT&T to divest itself of its local telephone companies and ordered that all long distance carriers be given "equal access" to local telephone interconnections. *United States v. American Tel. and Tel. Co.*, 552 F. Supp. 131, 232-33 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States,* 460 US. 1001 (1983). As a result, all telephone customers, including those who own or operate public phones, are able to select (or "presubscribe") to one of the many long distance carriers now competing in what was once an AT&T-dominated industry.

These sweeping changes also brought competition to the operator service industry. Telecom*USA works within this industry providing live or automated operator-assisted long distance service in competition with AT&T and others. Operator-assisted service includes, for example, calls billed to a calling card, collect calls and calls charged to a third party. Just like consumers who can presubscribe to long distance providers, those who own, operate, maintain or control telephones which are made available to the public—known as "aggregators"—may presubscribe to the long distance provider and operator service provider ("OSP") of their choice. When a caller using one of these public phones dials "0" or "1" plus a phone number, the call is automatically routed to the presubscribed OSP selected by the aggregator.

This new competition initially created customer confusion because some OSPs failed to identify themselves to consumers who made operator-assisted calls over a public phone presubscribed to an OSP. S. Rep. No. 439, 101st Cong., 2d Sess. (1990) (hereinafter "Sen. Rpt.") Consumers sometimes could not override the presubscribed OSP and reach the carrier they wanted to use. Some OSPs charged rates higher than those charged by AT&T for its interstate calls.

In response, Congress in 1990 enacted the Telephone Operator Consumer Services Improvement Act

("TOCSIA"). Congress noted that "[t]he States have supported federal legislation because they do not have jurisdiction over interstate calls, which represent the majority of operator services calls." Sen. Rpt. at 4. To "ensure that each consumer is given the information and opportunity to make an informed choice of the desired operator services carrier" (Sen. Rpt. at 5), TOCSIA requires every OSP to:

> (A) identify itself, audibly and distinctly, to the consumer at the beginning of each telephone call and before the consumer incurs any charge for the call;
>
> (B) permit the consumer to terminate the telephone call at no charge before the call is connected;
>
> (C) disclose immediately to the consumer, upon request and at no charge to the consumer—
>
> (i) a quote of its rates or charges for the call;
>
> (ii) the methods by which such rates or charges will be collected; and
>
> (iii) the methods by which complaints concerning such rates, charges, or collection practices will be resolved . . . .

47 U.S.C. §§ 226(b)(1)(A)-(C). TOCSIA also requires OSPs to file informational tariffs with the FCC that specify, among other things, the rates, terms and conditions relating to operator-assisted calls. 47 U.S.C. § 226(h)(1). The FCC reviews these informational tariffs to determine whether OSP rates and charges are "unjust or unreasonable." 47 U.S.C. § 226(h)(2).

TOCSIA also regulates the aggregators who control public telephones to assist callers in making informed choices among OSPs before the caller incurs any charge for a call. Aggregators must post information on each public telephone which: 1) identifies the OSP serving that telephone; 2) informs the consumer of the right to

obtain access to another carrier; and 3) includes the telephone number of the consumer affairs division of the FCC. 47 U.S.C. § 226(c)(1)(A). Congress also ordered aggregators to ensure that public telephones accept access which enable callers to place a call with the long distance company of their choice. 47 U.S.C. §§ 226(c)(1)(B), (C).

Congress recognized, however, that these direct consumer protections were only part of the national telecommunications policy it wanted to implement. Eliminating the existing AT&T domination of the OSP market was also national policy. Thus, Congress' goals were to "ensure that each consumer is given the information and opportunity to make an informed choice of the desired operator services carrier" while "*avoiding overly stringent regulation* that could harm the development of a competitive operator services market." Sen. Rpt. at 5 (emphasis added).

Finally, Congress charged the FCC with the responsibility for developing all necessary regulations under TOCSIA to protect consumers "from unfair and deceptive practices relating to their use of operator services to place interstate telephone calls and . . . ensure that consumers have the opportunity to make informed choices in making such calls." 47 U.S.C. §§ 226(d)(1)(A), (B). Pursuant to Congress' direction, on April 23, 1991, the FCC promulgated regulations that impose a broad range of requirements consistent with the goals of the statute. *See* 56 Fed. Reg. 18519. These regulations include specific posting requirements for aggregator telephones, rules prohibiting aggregators from blocking access to other long distance companies and detailed rules specifying the manner in which an OSP must identify itself before the consumer incurs any charge. *Id.* at 18521-22.

In November 1992, the FCC, as the agency charged with implementing TOCSIA, reported to Congress that

"[t]he statutory objectives of TOCSIA are being achieved. Consumers are being protected from unfair and deceptive practices relating to their use of operator services to place interstate telephone calls. Further, consumers have an opportunity to make informed choices in making such calls." *Final Report Pursuant to the Telephone Operator Consumer Services Improvement Act of 1990* (November 13, 1992) at 1.

B. The Proceedings Below

On December 11, 1992, petitioners filed a purported class action complaint alleging that respondent and other OSPs violated Illinois statutory and common law by providing "non-BOC [Bell Operating Company]" interstate long distance services and rates from public telephones. Specifically, the complaint alleged that OSPs fraudulently "passed off" their rates and services as those of AT&T and failed to inform petitioners of the "source, sponsorship, approval, services or rates provided at the telephone." Petitioners alleged that as a result of this conduct they were charged a higher rate than AT&T would have charged for the interstate long distance calls they placed from public telephones.

The complaint sought an injunction regulating the OSPs' future rates and requiring all competitors in the OSP industry to charge the same rates for interstate long distance calls, together with a refund of charges they had paid for long distance services in the past. Finally, petitioners sought a permanent injunction requiring the OSP defendants to "warn [consumers] of the sources of their product or service and the charges therefore." *

On July 14, 1993, the circuit court dismissed the complaint on the ground that it was preempted by the Federal

---

* Petitioners did not include the complaint in the appendix to the petition for certiorari. The complaint specifically sought "an injunction enjoining the Defendants from billing and collecting non-BOC rates at BOC-shared or BOC-type telephones," and a "refund to the Plaintiffs [of] all money spent for said charges alleged herein." (Complaint pp. 8-9).

Communications Act, 47 U.S.C. § 151, et seq., and the Telephone Operator Consumer Services Improvement Act ("TOCSIA"), 47 U.S.C. § 226. On September 17, 1993, the court denied petitioners' motions to vacate the dismissal order and for leave to file an amended complaint. The court recognized that if state courts allowed challenges to the identification practices of OSPs, "interstate phone service would be subject to the myriad and mutually conflicting requirements of various state laws" and would thereby defeat the very purpose of TOCSIA. (Pet. App. 20)

On November 13, 1995, the Appellate Court of Illinois, First District, affirmed the circuit court's order. Noting that "[c]ongressional intent is the 'ultimate touchstone' of any preemption analysis," (Pet. App. 6), the appeals court examined TOCSIA's statutory scheme and legislative history. The court first noted that:

> "Senate Report No. 101-439 spells out the intent of Congress. The purpose of TOCSIA was to end deceptive practices by telephone service providers and to grant consumers the opportunity to make informed choices regarding telephone services. That, of course, is what this lawsuit is all about."

(Pet. App. 9.)

The court then addressed the specific requirements set forth in TOCSIA and its implementing regulations. (Pet. App. 9-10) These include requiring OSPs to immediately identify themselves to the consumer and allow the consumer to terminate the call without incurring any charge; not bill for uncompleted calls; disclose, upon request, its rates, methods of collection, and a number where complaints may be filed, and ensure that consumers have access to alternative interstate carriers. The court also correctly pointed out that TOCSIA imposed requirements on aggregators designed to avoid consumer confusion, including the posting on or near the telephone of the identity of the OSP servicing that phone.

Against this backdrop, the court next studied petitioners' complaint to determine whether the causes of action and remedies requested therein conflict with Congress' legislative solution to the potentially deceptive identification and billing practices of OSPs. (Pet. App. 11-14.) The court found that petitioners' requested injunctive relief prohibiting OSPs from charging anything other than AT&T long distance rates and prohibiting Illinois Bell from billing or collecting on behalf of OSPs were direct attempts to dictate the rates, terms and conditions of OSPs, subjects within the exclusive domain of federal law.

Finally, the court rejected petitioners' attempt to redefine its complaint in terms of "trade dress" issues by accurately observing that:

> Even if we were to agree that plaintiffs' objective was to address the "striking similarity of the telephones [which] lulls the plaintiffs and consuming public into believing that they are using Bell telephones providing Bell rates and services," the claims would be preempted. Eliminating the public's confusion is the "object sought to be obtained" by Congress by enacting Bell rates and services," the claims would be prewould stand as an obstacle to the accomplishment of Congress's goals and objectives because differing local rules regarding operator services would ultimately add to consumer confusion, not diminish it.

(Pet. App. 13; citations omitted.)

The Illinois Supreme Court declined to review the circuit court's decision. (Pet. App. 1.)

REASONS FOR DENYING THE PETITION

The petition for certiorari should be denied because petitioners have not identified a conflict with any decision of any court, and have not raised any important legal issue that deserves this Court's attention. Petitioners seek correction of what they mischaracterize as an overly expansive

preemption ruling by an intermediate state court of limited geographic jurisdiction—a ruling that the Illinois Supreme Court (which has every incentive to be vigilant against overly expansive preemption rulings) deemed insufficiently important to warrant review. Thus, even if petitioners had colorable arguments on the merits, there would be no reason for this Court to consider them.

In any event, both the result below and the reasons provided by the Illinois appellate court for its decision are plainly correct. The relief petitioners sought from the state court—an injunction requiring uniform future rates for interstate OSP service, and a refund of a portion of prior rates—obviously transgresses the federal government's exclusive authority over the terms and conditions of interstate telecommunications services, and conflicts with Congress' decision in TOCSIA that OSP rates should be governed by market forces. Similarly, the substantive duties petitioners seek to impose on OSP providers conflict with the objectives of TOCSIA because (as the Illinois appellate court correctly held) they risk causing the very confusion Congress sought to eliminate, and upset the careful balance between regulation and competition that Congress deliberately struck.

1. The sole question framed in the petition—whether the court below incorrectly held that Congress had occupied the field of regulating operator services providers—is not genuinely at issue in this case. The relief petitioners sought is obviously preempted both by Sections 151 and 152 of the 1934 Communications Act and by TOCSIA because the requested relief would effectively dictate rates for interstate OSP telephone service—a subject governed exclusively by federal law. Furthermore, the Illinois appellate court correctly held that petitioners' claims were preempted because they *conflicted* with Congress' objectives under TOCSIA. Pet. App. 13 ("[a]llowing State action in this arena would stand as an obstacle to the accomplishment of Congress's goals and objectives because differing

local rules regarding operator services would ultimately add to consumer confusion."). It is elementary that state law is preempted if it conflicts with federal law—irrespective of whether Congress has occupied the field. *E.g., Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2617 (1992); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Remarkably, petitioners never discuss these aspects of the Illinois court's decision. Thus, even if petitioners were to prevail on the sole question presented in the petition, it would not entitle them to reversal of the decision below because their claims are preempted irrespective of whether TOCSIA occupies the field of OSP regulation. It is axiomatic that this Court reviews judgments, not statements in opinions.

2. Review is also unwarranted because the decision below does not conflict with any decision of a United States court of appeals or a state court of last resort. Indeed, the decision at issue appears to be the first judicial interpretation of the preemptive scope of TOCSIA. The only published opinion on this question was rendered by the Federal Communications Commission, and it is entirely consistent with the decision below. In *In re OSPA*, 6 F.C.C.R. 4475 (1991), the FCC reviewed a Tennessee statute providing that Operator Service Providers (OSP's) who failed to comply with certain rate and disclosure requirements violated the Tennessee Consumer Protection Act. The Tennessee statute addressed issues identical to those raised by petitioner's complaint. For example, the statute required that before providing service, any OSP charging a rate that exceeded the highest rate charged by a dominant carrier, such as AT&T, must: 1) identify by name the carrier providing the service; 2) state the costs associated with the requested service; and 3) offer to transfer the customer to any other carrier offering operator-assisted services and inform the customer that the transfer would be made without charge. *In re OSPA*, 6 F.C.C.R. at 4475.

The FCC declared that the statute was preempted:

> TOCSIA and its legislative history make clear that Congress viewed TOCSIA as establishing a "regulatory framework" for the interstate operator services industry, and as filling a need for comprehensive solutions . . . . [T]o implement this framework, the statute establishes a broad range of requirements governing the industry . . . Thus, it is apparent that Congress intended to, and did, create a comprehensive legislative solution to any problems in the interstate OSP industry—a federal solution that precludes a potpourri of differing state requirements applicable to interstate services.

In re OSPA, 6 F.C.C.R. at 4477. Moreover, the FCC explained that notification requirements which exceed those mandated in TOCSIA, like those petitioners seek here, "make impossible achieving the balance established by Congress between the degree of regulation and reliance on market place forces for interstate OSPs." *Id.* at 4478. The balance between unfettered competition and the public's right to be informed was Congress' way of protecting "consumers from the problems caused by the entrance of these new carriers while avoiding overly stringent regulation that could harm the development of a competitive operator services market." Thus, the only two opinions which appear to have addressed the issue—*In re OSPA* and the case under review here—reached the same conclusion.

3. Review is also unwarranted because the opinion below does not conflict with a prior decision of this Court. Under this Court's well-established preemption analysis, congressional intent is the "ultimate touchstone" for determining whether a federal statute preempts state law claims. *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. at 2617. As recently as last term, this Court reaffirmed the principle that congressional intent governs preemption analysis. *Medtronic, Inc. v. Lohr*, Nos. 95-754, 95-886, 1996 U.S. LEXIS 4260, *27 (June 26, 1996). In *Medtronic*, this Court explained that congressional intent

can be discerned primarily from statutory language and its accompanying "statutory framework." *Id.* (quoting *Gade v. National Solid Waste Management Assn.*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in part and concurring in judgment)). Thus, in assessing the preemptive scope of TOCSIA, the court below properly reviewed TOCSIA's language and legislative history. After careful and detailed consideration, the court concluded that "[t]he purpose of TOCSIA was to end deceptive practices by telephone service providers and to grant consumers the opportunity to make informed choices regarding telephone services," that Congress sought to establish a comprehensive and exclusive regulatory framework, and that enforcement of state law in the manner sought by petitioners would conflict with Congress' objectives. (Pet. App. 9.)

The court, in other words, applied this Court's established analysis to TOCSIA. While Petitioners may contend that the outcome of the court's analysis is wrong—that is, that their state claims are not preempted by TOCSIA—they cannot question the validity of the method of analysis itself. Thus, Petitioners resort to asking this Court to sit as a court of error to correct what they perceive to be the Appellate Court of Illinois' misapplication of settled preemption analysis.

4. In any event, the Illinois appellate court's ruling was plainly correct in all respects. Petitioners' claim is that the defendant OSPs passed off their rates and services from public telephones as AT&T's rates and services. Thus, petitioners assert that because of these alleged deceptive practices, petitioners believed "that they were using an AT&T or Bell serviced telephone, when in actuality they were using an alternate operator service." (Pet. 4.) To remedy these "deceptions," petitioners asked the circuit court to (1) order all OSPs to undertake additional "warnings" with respect to interstate calls, beyond those required by TOCSIA, to identify themselves to con-

sumers and (2) to prohibit every OSP in the nation from charging non-AT&T rates for interstate calls. Petitioners' claims and the relief they seek directly conflict with the requirements Congress has set for the OSP industry.

Both the substantive duties petitioners seek to impose and the remedies they request are flatly inconsistent with federal law. At bottom, petitioners seek to reorder the balance Congress struck between need for competition in the OSP industry and the need to provide information to consumers. As petitioners would have it, Congress should have required more or different "warnings" to consumers so that consumers would not be misled into believing "they were using AT&T or Bell serviced telephone[s], when in actuality they were using an alternative operator service." (Pet. 4.) As the appellate court correctly held, however, "[a]llowing State action in this arena would stand as an obstacle to the accomplishment of Congress' goals and objectives because differing local rules regarding operator services would ultimately add to consumer confusion, not diminish it." (Pet. App. 13); *accord In re OSPA*, 6 F.C.C.R. at 4478 ("[d]iffering federal and state requirements applicable to interstate operator services as consumers travel around the country making long distance calls are more likely to confuse, than to educate consumers").

In addition, petitioners' claims conflict with the goals of TOCSIA and the Federal Communications Act relating to interstate rates. Petitioners' complaint seeks an injunction requiring every OSP in the nation to charge the same rates and prohibiting them from billing and collecting rates set forth in their tariffs filed with the FCC pursuant to federal law. (Pet. App. 11.) In enacting TOCSIA, Congress expressly rejected the rate regulation the petitioners seek. *In re OSPA*, 6 F.C.C.R. at 4478. In any event, the rates charged by telecommunications carriers are at the very heart of the Communications Act's regulatory scheme.

Petitioners cannot avoid this result by recasting their claim as a challenge only to the alleged passing off of the telephone *instruments* as AT&T's, rather than a claim that OSPs "pass off" their rates and services as those of AT&T. The appellate court correctly rejected this gambit, stating that "[n]owhere in the prayer for relief do [petitioners] even mention the physical appearance or location of the public phones." (Pet. App. 12) Even in their petition before this Court, petitioners admit that they bring "claims relating to interstate telephone calls made from the concerned telephones . . . ." Moreover, even if petitioners' complaint *did* claim that consumer confusion over the identity of OSPs should be dealt with by changing the appearance of pay phones, it would be preempted. Congress already has decided how best to reduce consumer confusion while fostering competition.

Nor does the so-called "savings clause" contained in Section 414 of the 1934 Communications Act save petitioners' claims. That clause makes clear that the 1934 Act does not "abridge or alter the remedies now existing at common law or by statute." 47 U.S.C. § 414. As courts consistently have held, this provision preserves state law claims if, and only if, the state law claim challenges conduct not regulated by the Act. *Comtronics, Inc. v. Puerto Rico Tel. Co.*, 553 F.2d 701 (1st Cir. 1977); *Kellerman v. MCI Telecommunications Corp.*, 493 N.E.2d 1045 (Ill.), *cert. denied*, 479 U.S. 949 (1986). Where, as here, the state law claim concerns matters covered by the Act, Section 414 does not apply and the state law claim is preempted. *Thermalcraft, Inc. v. U.S. Sprint Communications Co.*, 779 F. Supp. 1039, 1041 (W.D. Mo. 1991); *M.R.C.S., Inc. v. MCI Telecommunications Corp.*, No. Civ. A 86-3831, 1987 U.S. Dist. LEXIS 5244, *6 (E.D. La. Jun. 16, 1987).

Petitioners' reliance on *Kellerman* is misplaced. The complaint in *Kellerman* alleged that the defendant had disseminated specific advertisements and promotions (iden-

tified and attached to the *Kellerman* complaint) that contained allegedly false statements about its rates and practices. *Kellerman*, 493 N.E.2d at 1048. The complaint in *Kellerman*, therefore, challenged conduct *independent of the defendant's provision of telecommunications services* —conduct which was not regulated by federal law. Because the advertising at issue was sufficiently removed from the objectives of Congress in enacting the Communications Act, the Illinois Supreme Court concluded that the state law claims presented there were not preempted. However, the Illinois Supreme Court reaffirmed the preemption principle which the appellate court applied here:

> [I]t is implausible to think that section 414 of the Act preserved all State-law remedies affecting interstate telephone carriers no matter how repugnant those State laws are to the purposes and objectives of Congress . . . . It is reasonable to presume that State laws which interfere with Congress' objective . . . to regulate interstate carriers' charges or services, would be preempted by the Act.

Id. at 1051; *accord Thermalcraft*, 779 F. Supp. at 1041 (quoting *Kellerman*, 479 N.E.2d 1057, 1061 (Ill. App. 1985). Moreover, *Kellerman* did not involve operator services and was decided years before Congress enacted the detailed legislative scheme in TOCSIA. Thus, this Court had no occasion in *Kellerman* to consider the preemptive effect of TOCSIA's notification requirements or its other provisions.

Equally misplaced is petitioners' offhand reliance on this Court's recent holding in *Medtronic, Inc. v. Lohr*, Nos. 95-754, 95-886. Petitioners cite this case for the proposition that preemption of state law claims may not be maintained in the face of an express savings clause. In *Medtronic*, this Court overturned the lower court's preemption of state law causes of action because there was no rational nexus between the federal statute at issue and the state law causes of action asserted by the plaintiff.

Because the federal statute was unrelated to the conduct targeted by the state law claims, preemption of those claims was not appropriate. In reaching this decision, however, the Court expressly acknowledged that preemption is warranted when, as here, a state law cause of action encroaches upon a clearly articulated federal legislative objective. The Court observed that the case presented in *Medtronic* is:

> unlike a case in which the Federal Government has weighed the competing interests relevant to the particular requirement in question, reached an unambiguous conclusion about how those competing considerations should be resolved in a particular case or set of cases, and implemented that conclusion via a specific mandate . . .

1996 U.S. LEXIS 4260, at *53. In this case, Congress has plainly weighed the competing interests, and set forth clear rules for the operator services industry.

The appellate court in the instant case correctly found that petitioners' claims are preempted because petitioners request relief which, if granted, would directly contradict the carefully wrought regulatory objectives of Congress. By seeking an "injunction prohibiting the charging of non-BOC rates . . . and an injunction enjoining the Defendants from billing and collecting non-BOC rates," petitioners challenge the right of respondents to charge and collect their federally-filed rates for the service they provide to the public. In so doing, they "undermine the determination of TOCSIA that the interstate OSP marketplace, at least for the time being, be permitted to operate free of rate regulation." *In re OSPA*, 6 F.C.C.R. at 4478.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

DONALD B. VERRILLI, JR.
JENNER & BLOCK
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

THOMAS F. O'NEIL III
MCI COMMUNICATIONS CORPORATION
1133 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 736-6412

CHESTER T. KAMIN *
GREGORY J. SCANDAGLIA
JOHN F. WARD, JR.
JENNER & BLOCK
One IBM Plaza
Washington, D.C. 20036
(312) 222-9350
*Counsel for Respondent Telecom*USA*

* Counsel of Record

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